In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1098

MIKE ABBAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Central District of California, petitioner was found guilty on three counts of a 12-count indictment charging that he had willfully aided and assisted in the preparation of income tax returns which were false as to material matters, in violation of 26 U.S.C. 7206(2). He was sentenced to a term of three years' imprisonment, all but 90 days of which was suspended, placed on probation for three years, and fined a total of $500. The court of appeals affirmed (Pet. App. A).

The pertinent facts are as follows: Petitioner prepared the 1970 income tax return for a Miss Vinluan in which she claimed $848 of deductions for expenses that she had not in fact incurred (Tr. 224, 227-238).[1] The deductions consisted of alleged payments to doctors and dentists

[1] "Tr." designates the transcript of proceedings at the trial.

($152); medical insurance ($146); dues, subscriptions and books ($65); and various other false deductions (Tr. 227-238). Petitioner prepared this return after he had discussed the items of income and expense with Miss Vinluan for about an hour (Tr. 224-225). She did not know where he got the deduction figures that he put on the return, but he advised her that these were just "little amounts, and the IRS would not bother to look at them" (Tr. 239).

The other two counts on which petitioner was convicted involved amended returns for the years 1968 and 1969 for a Mr. and Mrs. Emerson. Mr. Emerson presented to petitioner copies of his original 1968 and 1969 returns, which had been prepared by a firm of certified public accountants (Tr. 405-407). Petitioner looked at them, said "This is ridiculous" and stated that they could be amended (Tr. 407). He then prepared false amended returns for those years (Tr. 408-409), claiming $250 for drugs, medicines and vitamins instead of the correct figure of $125 shown on the original return (Tr. 412, 414); $350 of gasoline taxes rather than the correct figure of $105 shown on the original return (Tr. 414-415); $130 of contributions to churches instead of the correct figure of $30 (Tr. 415-416); and various other inflated deduction figures. These false deductions totalled $664 for 1968 (Tr. 412-418). Petitioner followed the same procedure for the year 1969, claiming $250 of drugs and medicines instead of the correct figure of $60 shown on the original return (Tr. 420); $440 of real estate taxes rather than the correct figure of $370 (Tr. 423); and various other inflated deduction figures, which totalled $785 (Tr. 420-427).

These amended returns of the Emersons, like Miss Vinluan's original return, were filed with the Internal Revenue Service. Emerson paid petitioner a fee of $40 for preparing each of the false amended returns (Tr. 408). During the Treasury agents' investigation, petitioner phoned Mr. Emerson on a number of occasions and urged

him not to answer any of the agents' questions until he had contacted petitioner (Tr. 465) and not to show them any documents (Tr. 466). He also sent Emerson a magazine article which set forth the penalties for knowingly filing a false return (Tr. 466-467).

1. Petitioner argues (Pet. 9-13) that he was deprived of due process of law because there was no proof that the false items in the tax returns were material to the computation of correct tax liability. However, it is apparent that the amount of deductions claimed on a return has a direct bearing on the computation of tax liability. At all events, it is well settled that the government is not required to prove the existence of tax deficiencies in a prosecution under Section 7206(2) for aiding in the preparation of false tax returns. See, *e.g.*, *Edwards* v. *United States*, 375 F.2d 862, 865 (C.A. 9); *Hull* v. *United States*, 324 F.2d 817, 823 (C.A. 5).

2. Petitioner further contends (Pet. 13-16) that the trial court's instructions to the jury on the issue of willfulness were incorrect and contrary to *United States* v. *Bishop*, 412 U.S. 346. The instructions on willfulness were as follows (Tr. 714, 715):

> The crime charged in this case is a serious crime which requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

> An act or failure to act is knowingly done, i[f] done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.
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> An act is done willfully if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

Contrary to petitioner's argument, these instructions were in full compliance with the Court's decision in *Bishop*. It was unnecessary for the jury to be instructed that petitioner was not guilty if he had a good faith belief in the truthfulness of the returns since that point was encompassed in the trial court's instruction with respect to knowledge and purpose. See *United States* v. *Hawk*, 497 F.2d 365, 368-369 (C.A. 9), certiorari denied, October 15, 1974, No. 73-1873.

3. Petitioner also argues (Pet. 16-20) that the trial court erred in giving an "*Allen* charge" to the jury. This charge (Tr. 732-736) instructed the jurors to attempt to reconcile their differences and to agree upon a verdict if they could conscientiously do so.

The charge given to the deadlocked jury closely paralleled the instruction approved by this Court in *Allen* v. *United States*, 164 U.S. 492, 501. Although it was decided nearly 80 years ago, this Court quoted approvingly from *Allen* three terms ago in *Johnson* v. *Louisiana*, 406 U.S. 356, 361, stating that "a dissenting juror should consider whether his doubt was a reasonable one." See also *Lias* v. *United States*, 284 U.S. 584. The instruction made plain to the jury that no juror should merely acquiesce in the conclusion of others and that the jurors "should not surrender [their] honest convictions as to the weight or effect of evidence solely because of the opinion of other jurors, or for the mere purpose of returning a verdict" (Tr. 733).

Four courts of appeals have determined in the exercise of their supervisory power that the *Allen* charge should be modified with balancing elements. *United States* v. *Angiulo*, 485 F.2d 37 (C.A. 1); *United States* v. *Fioravanti*, 412 F.2d 407 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States*, 396 U.S. 837; *United States* v. *Brown*, 411 F.2d 930 (C.A. 7), certiorari denied, 396 U.S. 1017; *United States* v. *Thomas*, 449 F.2d 1177 (C.A.D.C.). These courts have suggested that the charge, if given, approximate the ABA Standards.[2] "[I]n the interest of judicial economy and uniformity" the Seventh Circuit has ruled that only a particular form of supplemental instruction can be given to the jury. *United States* v. *Silvern*, 484 F.2d 879, 882-883.

Other courts of appeals have approved a more traditional *Allen*-type charge. See, *e.g.*, *United States* v. *Birrell*, 447 F.2d 1168, 1173 (C.A. 2), certiorari denied, 404 U.S. 1025;[3] *United States* v. *Bailey*, 468 F.2d 652, affirmed, 480 F.2d 518 (C.A. 5) (*en banc*); *United States* v. *Wiebold*, 507 F.2d 932 (C.A. 8).

Whatever division in the form of the instruction there may be, however, all courts of appeals agree that some form of supplemental charge can be given to a jury that has been unable to agree. The use of the *Allen*-type instruction is still being reexamined by the various circuits. However, there is no difference among the circuits con-

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[2]ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury, Section 5.4 at 145-146 (Approved Draft, 1968).

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[3]Accord, *United States* v. *Cowles*, 503 F.2d 67 (C.A. 2), certiorari denied, January 13, 1975, No. 74-5409. The Court has recently denied certiorari in two other cases raising the *Allen*-charge issue. See *Fonseca* v. *United States*, 490 F.2d 464 (C.A. 5), certiorari denied, December 16, 1974, No. 74-5359; *Villasencia-Garcia* v. *United States*, decided November 8, 1974, No. 74-2299 (C.A. 9), certiorari denied, March 3, 1975, No. 74-5674.

cerning the constitutionality of the instruction. Such differences as remain may properly be attributed to the supervisory power possessed by each court of appeals.[4]

4. Petitioner renews the argument (Pet. 20-22) that the trial court erred in admitting in evidence certain charts summarizing the evidence. With respect to this contention, the court of appeals concluded (Pet. App. A 3-4) that while it would have been better practice not to have permitted the jury to use the charts during its deliberation, petitioner was not harmed in view of the "guarding instructions" given by the trial judge as to the use to which the charts could be put (see *Holland* v. *United States*, 348 U.S. 121, 128), and in view of the fact that none of the errors which allegedly crept into the charts had any bearing on the counts on which petitioner was convicted.

5. Finally, petitioner urges (Pet. 23-24) that there was no proof that he was the person who committed the prohibited acts. But the testimony of Miss Vinluan and Mr. Emerson fully established that petitioner prepared the returns, that all of their dealings were with him, that it was his idea to prepare false amended returns for 1968 and 1969 for Mr. and Mrs. Emerson, and that he advised Emerson during the investigation not to talk to the agents or give them any documents (Tr. 224, 408-409, 465, 466).[5]

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[4]Indeed, the Ninth Circuit itself appears to be in the process of reexamining supplemental instructions to deadlocked juries. In *United States* v. *See*, 505 F.2d 845, 854 (emphasis in original), the court wrote: "We doubt that it is really any longer advisable to give the *Allen* instruction at all, and it *certainly should be given only when it is apparent to the district judge from the jury's conduct or the length of its deliberations that it is clearly warranted.*" In *See*, the defense argued that an *Allen* instruction should have been given before the court declared a mistrial after the jury announced it was deadlocked.

[5]Petitioner's argument (Pet. 22-23) that the trial court erred in admitting Emerson's copies of original 1968 and 1969 returns rests entirely upon his misconception that Emerson "did not testify that the original returns correctly reflected their allowable deductions" (Pet. 22). However, Emerson did so testify with respect to each relevant item (Tr. 412-427).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.